



July 19, 2006

HARMAN STATEMENT ON MODERNIZING THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA)

Cites the Need for Modern Intelligence Tools, Urges Passage of the LISTEN Act

WASHINGTON D.C. -- Rep. Jane Harman (D-Venice), Ranking Member on the House Intelligence Committee, today issued the following statement at an open hearing of the House Permanent Select Committee on Intelligence. She discussed the need to maintain FISA's status as the exclusive way to conduct surveillance of Americans while requiring, through her proposed LISTEN Act (HR 5371), the President conduct all surveillance under FISA.

The last time we held a public hearing, Mr. Chairman, we were locked down for four hours, unable to leave the hearing room. The last time Jim Dempsey testified before our Committee, we had to evacuate the building due to an errant airplane. I'm hoping these two forces will cancel each other out and that we'll be able to hold the hearing today without being either locked in or chased out.

In my nearly four decades of involvement in public policy, I can hardly remember a time when the world looked more dangerous. In the past three weeks, we have witnessed a provocative missile test by North Korea, a synchronized bomb attack in Mumbai, brazen kidnappings and rising insurgent violence in Iraq, continued defiance by Iran on its nuclear program, and the latest missile-barrage by Hezbollah against Israel along the Lebanon border.

We'd be naïve to think that our country will remain immune from these dangers ... that these, or even more dangerous, weapons won't someday reach our shores. That's why we need modern intelligence tools to detect terror cells that may be operating here, within our borders. These tools must keep pace with the technology that the terrorists use to communicate.

Since 9/11, Congress has modernized the Foreign Intelligence Surveillance Act (FISA) at least a dozen times. Each time the Administration has come to Congress and asked to modernize FISA, Congress has said "yes." Congress extended the time for obtaining emergency warrants so that surveillance can begin 72 hours before the government obtains a warrant. Congress expanded the authority to conduct "trap and trace" surveillance on the Internet. Congress expanded the ability to get "roving John Doe" wiretaps for terrorists who switch cell phones.

The Congressional Research Service has compiled a report, at my request, detailing all of the improvements to FISA since 1978 and since 9/11. I urge my colleagues to review this, and I ask Unanimous Consent that it be made part of the record.

I raise this, Mr. Chairman, because I want to be clear at the outset that abiding by FISA does NOT mean clinging to a 1978 structure. FISA has been modernized.

But I also believe that the President must respect the rule of law and follow it.

Yesterday, for the first time, Attorney General Gonzales acknowledged that the President personally blocked security clearances for career professionals at the Justice Department's Office of Professional Responsibility (OPR) who were tasked with conducting oversight over the NSA program. This prompted OPR chief lawyer, H. Marshall Jarrett to write:

"Since its creation some 31 years ago, OPR has conducted many highly sensitive investigations involving Executive Branch programs and has obtained access to information classified at the highest levels. In all those years, OPR has never been prevented from initiating or pursuing an investigation."

This is stunning. FISA has two pillars: the first is court warrants; but the second is oversight by Congress. If the President operates outside of FISA, and then if he blocks oversight within his own Justice Department, then there is no oversight at all. He must step up to the bat.

As the Supreme Court said both in *Hamdi* and more recently in *Hamdan*, the President must not have a "blank check," even in wartime.

So, Mr. Chairman, I support the capability of listening in on terrorists. But the President must also listen to Congress.

For that reason, many of us in this Committee and in the Judiciary Committee authored the LISTEN Act, the Lawful Intelligence and Surveillance of Terrorists in an Emergency by the NSA Act, of 2006.

The bill has 59 cosponsors in the House, and has been endorsed by the American Civil Liberties Union, the American Bar Association, the Center for Democracy and Technology, and the Open Society Policy Center. It has also been endorsed by Bruce Fein, a prominent attorney and former Justice Department official under President Reagan. We have also received a statement from a coalition of 17 organizations – including former Congressman Bob Barr's group, Patriots to Restore Checks and Balances – that says that the LISTEN Act is "the correct approach."

The LISTEN Act reiterates that FISA is the exclusive way to conduct surveillance against Americans. It states that the Authorization to Use Military Force does not authorize a violation of a statute passed by Congress and signed by the President.

And it provides NSA and the Justice Department with the necessary resources – staffing, information technology, etc. – to obtain warrants in near real time.

Mr. Chairman, the on-the-record testimony received by this Committee has been that emergency applications can be approved, on average, in about a day. In true emergencies, they can be approved orally ... in as short as a few minutes. That's not typical, but it is possible. And what I'm for is making it not just possible, but typical.

As I've often said, we can't fight a digital enemy with an analog intelligence system. Having a digital capability means forward-deploying Justice Officials into the NSA Headquarters and FBI field offices. It means giving them blackberries for instant communication, streamlining application forms, allowing electronic filings, and increasing the number of individuals who are able to authorize emergency applications -- so that we can intercept the communications of foreign agents the moment there is probable cause.

At next week's hearing, we will review some of the current legislative proposals. I applaud Senator Specter, Senator DeWine, and Congresswoman Wilson for attempting to put a legal framework around security policies.

However, in my view, these bills are solutions in search of a problem. Members of this committee have been briefed on the program, many of us believe that the surveillance the President wants to do can and must be done completely under the current FISA system.

The Fourth Amendment states: "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The key words here are "particularly describing...." The hallmark of the Fourth Amendment is particularized suspicion – the notion that the government can't just go on a fishing expedition against American citizens. As the Supreme Court held in *Stanford v. Texas* (1965), general search warrants are unconstitutional.

When the government wants to eavesdrop on the calls or read the emails of Americans – which the Courts have held deserve the most protection from government intrusion – the government must get an individualized warrant. The Specter and Wilson bills provide a "blanket" authorization, which is not consistent with the Fourth Amendment.

The rule of law and our Constitution are not some quaint traditions – they are the bedrock of our country ... they are what our brave women and men are fighting for around the world at this most dangerous hour.

Let me conclude, Mr. Chairman by saying that the Committee has received several additional letters and statements on this topic from experts in this field, and I ask unanimous consent that they be included in the record. I also ask unanimous consent that

the record be held open for an additional two business days so that other experts can share their views with the Committee.

I thank you, Mr. Chairman, for working with me to have this hearing. And I thank the very capable witnesses for what I know will be an enlightening hearing.